IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE EIGTH DAY OF OCTOBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE J. CHELAMESWAR

AND

THE HON;BLE MR JUSTICE GODA RAGHURAM

WRIT PETITION NO : 6825 of 2004

Between:

1. The Chief Commissioner of

Income Tax, Vizag.

2 The Chief Commissioner of

Income Tax-1, Ayakar Bhavan,

Hyderabad.

..... PETITIONERS

AND

K. S. Devasahayam,

S/o K.S. Joseph, R/o H.No.42-1,

Coles Compound, Kurnool-518 001

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ, order or direction more particularly one in the nature of Writ of Certiorari to call for the records in O.A. No.1502 of 2003 on the file of the Central Administrative Tribunal, Hyderabad Bench, and declare the Order in O.A. No. 1502 of 2003, dt 10—3-2004 on the file of the Central Administrative Tribunal, Hyderabad Bench, Hyderabad and consequently set aside the same in the interest of justice.

For the Petitioners: Mr. B.Narasimha Sarma, Standing Counsel

For the Respondent : K.S. Devasayayam (Party-in-person)

The Court Made the Following:

:: ORDER ::

(Per the Hon'ble Mr Justice G. RAGHURAM)

Aggrieved by the order of the Central Administrative Tribunal, Hyderabad Bench (the Tribunal), dated 10.3.2004 in OA No. 1502 of 2003, the respondents therein have filed this writ petition. While the OA was filed by the respondent herein, impleading as respondents the Chief Commissioner of Income Tax, Visakhapatnam, the Chief Commissioner of Income Tax-I, Hyderabad and the Union of India represented by the Secretary of Finance, the two Chief Commissioners of Income Tax specified above have only chosen to file this writ petition.

The respondent herein had preferred the OA aggrieved by the order dated 29.7.2003 of the Chief Commissioner of Income Tax, Visakhapatnam, discharging him from service with effect from 29.7.2003 on the ground that he did not fulfil condition No.(xi) of the appointment order dated 22.5.1990 r/w Rule 19 of the Rules of Direct Recruitment.

The respondent was selected as an Income Tax Inspector through a Staff Selection Commission examination of 1985 pursuant to a notification dated 3.3.1985. He was appointed as Income Tax Inspector by the proceedings dated 22.5.90 and assumed charge of the post w.e.f. 1.6.1990. the appointment of the respondent herein, by the

proceedings dated 22.5.90 was subject to certain specified conditions. One of the conditions (condition No.xi) is as under:

" He is also informed that he will have to pass departmental examination for Inspector of Income Tax within a period of two years."

Another condition (No. iii) is – " *His retention in the service is subject to his being found suitable for Government service in all respects."*

Under condition No.(vi), by the order of appointment, the respondent was informed that his appointment will be purely on a provisional basis, he will be initially on probation for a period of 2 years and if, in the opinion of the Government, his working o r conduct is unsatisfactory or shows that he is unlikely to become an efficient Income Tax Inspector, the Government may discharge him at any time.

As per condition No. (xi) of the order supra, the respondent was placed on probation for a period of two years. He however did not pass the departmental examination for the post of Inspector of Income Tax within the period of two years. Nevertheless his probation was declared by the proceedings dated 9.9.1992. He was summarily terminated from service by proceedings dated 1.2.1999, apparently invoking the power under condition No. (vi) of the appointment order. Aggrieved thereby the respondent instituted OA No.289/99 before the Tribunal. The OA was allowed by the order dated 14.10.99 on the conclusion that when the termination order was passed on 1.2.99, the respondent was not a temporary Government servant as his probation was declared and therefore his service could not have been terminated without notice or opportunity afforded to him. Accordingly the order of termination dated 1.2.99 was set aside and the respondent was directed to be reinstated into service and the period from 1.2.1999 till his reinstatement was directed to be treated as leave due to him. The Tribunal also in the order in OA No.289/99, granted liberty to the respondent to pass the requisite departmental examination within two attempts in any of the two examinations to be held immediately after the order of the Tribunal and in case he fails to qualify in any those examinations, the petitioners herein were accorded liberty to terminate his service after giving him a notice.

Aggrieved by the above order of the Tribunal the Union of India and the petitioners herein filed W.P. No. 23990/99. This writ petition was partly allowed by the judgment of a Division Bench of this court dated 7.11.2001. While confirming the invalidation

of the order dated 1.2.99 terminating the service of the respondent, this court held that as the probation of the respondent was declared, he had acquired a vested interest in the post and any adverse impact on such a vested interest requires compliance with the principles of natural justice. As admittedly the probation of the respondent was declared w.e.f. 1.5.1990 by proceedings dated 9.9.92, this court held he could not have been terminated from service without issuing a notice to him.

In so far the liberty granted by the Tribunal for the respondent to get qualified within two more opportunities, this court held that whether such extension of time should be granted to the respondent is a matter that is exclusively within the discretionary domain of the Department and the Tribunal or this court should not usurp such discretion. The direction of the Tribunal, on this aspect was set aside. It was also made clear by this court that the judgment of this court does not preclude the department from initiating action against the respondent in conformity with the principles of natural justice and the relevant regulation. Pursuant to the judgment of this court above confirming the order of the Tribunal in OA No. 289/99 he was reinstated into service on 13.2.2002.

By a memo dated 25.2.2003 the respondent was issued a show cause notice why his service should not be terminated within 15 days from the date of issue of the order, as he did not pass the departmental qualifying examination in two attempts in any of the two examinations to be held immediately after the issue of the order of the Tribunal. It requires to be noticed that this memo dated 25.2.2003 was issued much later to the judgment of this court dated 7.11.2001 in W.P. No. 23990/99 wherein this court has set aside the liberty granted by the Tribunal to the respondent herein enabling him to pass the requisite departmental examinations in two further attempts. Meanwhile the petitioners herein preferred a SLP against the order of this court dated 7.11.2001. The Supreme Court dismissed the SLP summarily at the stage of admission. Three more memos were issued in reiteration of the memo dated 25.2.2003 and by an order dated 27.9.2003 the respondent was discharged from service w.e.f. 29.7.2003. The reasons and the operative portion of the order dated 29.7.2003 read as under:

> *“ 6. Keeping in view the observations of the Hon’ble High Court of Andhra Pradesh mentioned above, and also the failure of the official to pass the departmental examination for Inspector of Income-tax, a show cause notice was issued to him by the Commissioner of Income-tax-3, Hyderabad, vide memo in F.No.CIT-3/Estt/01-02, dated 21.02.2002 calling for his explanation*

as to why his services would not be discharged for not having passed the departmental examination within the prescribed period as required by the Rules. There was no reply to the said memorandum from the Official. Another memorandum was thereafter issued by this office on similar lines calling for his reply/objection vide memo in CC.VSP.DP.7/02-03, dated 22.07.2002. The said memorandum was duly served on the official. But the official did not choose to comply with the said memorandum. One more opportunity was given to the official vide this office memorandum in F.No. CC.VSP.DP 7/02-03, dated 14.11.2002 calling for his explanation as to why he should not be discharged from services for not having passed the departmental examination in terms of Rule 9 of the Rules read with conditions of Appointment and as to why his failure for not offering explanation/representation to the earlier memorandum should not be treated as acceptance of the proposed action. This memorandum was also duly served on the official. Even tot his, the official did not respond or did not file any explanation. However, a final opportunity was given to the official calling for his explanation as to why he should not be discharged from service for not having passed the departmental qualifying examination in terms of Rule 9 of the Rules read with conditions of appointment and as to why his failure in not offering explanation/representation to the earlier memoranda should not be treated as acceptance of the proposed action, vide this office memorandum F.No.CC.VSP/DP.7/2002-2003, dated 17.06.2003. The said show cause notice was duly served on the official. In compliance with this memo a reply has, however, been received from the official on 7th July, 2003.

7 . It is pertinent to mention here that the official Sri K.S. Devasahayam reported to duty in this office on 03.07.2002 on transfer from Hyderabad and applied Earned Leave from 04.07.2002 to 12.07.2002. This leave was granted to him with a direction that he should not proceed on leave without prior intimation and sanction of leave by the appropriate authority. He reported to duty on 15.07.2002 and immediately filed a leave application on 06.07.2002 seeking leave from 07.02.2002 to 30.07.2002 and left the Headquarters without sanction of leave applied for. And as a matter of fact, he has not reported to duty till today. In the meantime, he was issued a memo in CC.VSP.DP.7/2002-2003, dated 17.021.2003 calling for his explanation as to why disciplinary action should not be taken against him for the unauthorised absence from duty. But the official did not prefer to comply with the said memo.

8 . The explanation offered by the official in response to this office memorandum F.No. CC/VSP/DP.7/2002-03, dated 17.6.2003 has been considered by the undersigned and found that there is no merit in the said explanation. The fact remains that the official never chose to appear and pass departmental examination as per the condition (xi) of the Appointment Order and also as per rules for the Direct Recruitment. By not fulfilling the condition contained in the order of Appointment and by not complying with the Rules for Direct Recruitment he has made himself liable to be discharged from the Government Service.

9. In view of the above Sri K.S.Devasahayam, Inspector of Income-tax is hereby discharged from service with effect from 29th July, 2003 after noon, since he did not fulfil the condition (xi) of the Appointment Order dated 22.05.1990 read with the Rule 19 of the Rules for Direct Recruitment, which is prerequisite for continuation in the service."

Aggrieved by his discharge from service the respondent filed OA No.1502 of 2003 before the Tribunal. The Tribunal allowed the OA. It held that the service of the respondent was duly confirmed on his declaration of probation; that condition No.(xi) did not expressly or by any necessary implication stipulate that non-passing of the departmental examination would entail termination from service; no conclusion could be drawn from the above condition that on the respondent not passing the requisite examination he would be terminated; nor did the conditions specify as to how many chances in the specified two years the applicant could avail. The Tribunal in substance held that as the order of declaration of probation of the respondent was not rescinded or cancelled it is not open to the department to contend that the order of confirmation was erroneous. As the respondent was an approved probationer there was no escape from following the CCS Rules before terminating his services. Since the terms of the respondent's appointment did not specifically stipulate that the passing of the departmental examination was mandatory before declaration of probation or his confirmation in the post, the Tribunal declared that it would now be unfair to contend that the order of declaration of the respondent's probation was erroneous. The Tribunal invalidated the order dated 29.7.2003 discharging the respondent from service, on the ground that such discharge which amounts to termination of service, could not have been made without following the CCS Rules and that mere calling for explanation from the petitioner without following the detailed procedure for termination of service, was unsustainable.

Indisputably the respondent is an approved probationer in the post of Inspector of Income Tax. His probation was duly declared as having been satisfactorily completed. Mr. B.Narasimha Sarma, learned Standing Counsel for the Department – writ petitioners, on instructions stated before this court that the declaration of the respondent's probation was on the basis of an assessment and recommendation of a Departmental Promotion Committee and a consequent order of the competent authority.

Responding to a query from this court as to whether any action was initiated against any officer or officers responsible for the grossly negligent conduct of declaring the petitioner's probation without his having passed the departmental examination, the learned Standing Counsel for the department states that as none of the writ petitioners are competent to initiate any such enquiry the Union of India has been addressed recently in the matter. Apparently neither was any corrective action initiated by way of recalling or rescinding the order dated 9.9.1992 declaring the respondent's probation, after notice and opportunity to the respondent nor was any inhouse enquiry initiated against the negligence if any in the matter of declaring the respondent's probation. As the respondent is an approved probationer he could not be summarily discharged/terminated from service is what the Tribunal held.

On behalf of the petitioner reliance was placed on a decision of the Supreme Court in ***Commandant, 11th Battalion, A.P. Special Police (IR), Cuddapah, Cuddapah District vs B. Shankar Naik ().*** The facts – certain persons were appointed as Constables and placed on probation for a period of 3 years. They were required to undergo training in the A.P. Police Recruits School u/Rule 11(a) of the AP Police Subordinate Service Rules. The appointment order was subject to conditions. One of the conditions was that the appointee should pass the language test within the period of probation and in case of failure he would be discharged from service. They were sent for training and on completion were to be posted to work as Constables. The appointment order clearly indicated that they should undergo 10 months basic training. The services of some of the appointees were termination u/Rule 6(f)(i) of the AP State and Subordinate Service Rules 1996 on the ground that they failed to pass the prescribed test within the prescribed period of probation. The orders of termination were challenged by the effected appointees on the ground that these rules are not applicable to them as they passed the SSC examination in Telugu as the medium of instruction and were thus exempted from passing any test u/Rule 14. The A.P. Administrative Tribunal, before which the orders of discharge were challenged, dismissed the application on the ground that successful completion of the training was mandatory and failure thereat entails discharge from service. Aggrieved the petitioners approached this court. This court declared the orders of discharge unsustainable on the ground that as the constables had passed the SSC examination in Telugu medium, they were entitled to exemption and the order of appointment did not refer to any other tests in which the selected recruitees were

required to come out successful. Before the Supreme Court in appeal it was contended that the orders of discharge were based on several grounds including non-passing of the language test and failure in the training. If a candidate did not successfully complete the training there was no justification to continue him in service, was the contention in appeal before the Supreme Court. In defence of this later contention by the appellants, the appointees contended that the appointment order only referred to the period of probation and language test but there was no prescription of completing the training successfully. Rejecting this contention the Supreme Court held that if the contention of the appointees is accepted it would mean that the training was intended to be a meaningless and purposeless exercise having no relevance. A person who is sent for training is required to complete the same and where the authority finds that the trainee has not succeeded in the test conducted after the training, the inevitable conclusion is that he has not undertaken training successfully, held the Supreme Court. Thus, the requirement stipulated in the appointment order would not have been complied with. In such a case the authorities would be justified in passing the order of discharge, ruled the Apex court.

Applying the above ratio enunciated by the Supreme Court the contention of the respondent herein cannot be countenanced that mere absence of a specific stipulation in the order of appointment dated 22.5.90 that non-passing of the departmental examination for Inspectors of Income Tax within a period of two years would entail termination or discharge from service, would disentitle the department to discharge an Inspector of Income Tax from service even if he failed to clear the departmental examination. The passing f the departmental examination within the stipulated period is a *sine qua non* for the continuance in service of such an employee.

However, as the respondent was an approved probationer in the post of Inspector of Income Tax, he could not be merely discharged from service as rightly held by the Tribunal, but could be discharged only on compliance with the procedural rigour of the CCS Rules. Nothing in this order of this court should be construed as a limitation or prohibition on the exercise of appropriate power by the petitioners to deal with the respondent, including any steps to recall or rescind the order dated 9-9-1992, in accordance with law.

On the above analysis we find no error in the order of the Central Administrative Tribunal, Hyderabad Bench, dated 10.3.2004 in OA No. 1502 of 2003, warranting

interference in this writ petition. The writ petition is accordingly dismissed. No order as to costs.

Date:08.10.2004 ----------

Pvsn Justice J. Chelameswar

Justice G.Raghuram

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